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**THE**  
**MARRIED WOMEN'S PROPERTY ACT,**  
**1870.**

L. Eng. C28e

Project 34

THE  
MARRIED WOMEN'S PROPERTY ACT,  
1870:

ITS RELATIONS TO THE  
DOCTRINE OF SEPARATE USE:

With Notes.

By J. R. GRIFFITH, B.A., Oxon,  
OF LINCOLN'S INN, BARRISTER-AT-LAW.

*SECOND EDITION.*

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## PREFACE TO THE SECOND EDITION.

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SINCE the "Notes on the Married Women's Property Act" were first written, but few cases appear to have arisen on the construction of the Act, and most of the questions, which require judicial decision, before the effect of the recent legislation on the general law of husband and wife can be ascertained, are still left untouched by authority. Such cases as have been reported will, it is believed, be found to have been noticed in the present Edition; while a few additions, suggested by the copious discussion to which the Act has given rise, have been made to the text. Under these circumstances the Author ventures to hope that the demand for a new Edition may be deemed a sufficient excuse for its appearance in so slightly-altered a form.

24, Old Square, Lincoln's Inn,  
November, 1872.



## PREFACE TO THE FIRST EDITION.

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THE object of the Married Women's Property Act 1870, as defined in the Preamble is, "To Amend the Law of Property and Contract with respect to Married Women." Under the Act, the rights which women have hitherto enjoyed in Equity in respect of separate estate, are apparently recognised and adopted; while a most beneficial, if somewhat anomalous, position is given to them at Law. It has been attempted, in the following Notes, to give a summary of the cases, decided in Courts of Equity, on the rights and liabilities of married women in relation to their separate estate; and to suggest some changes, which may probably arise in the practice of the Courts, from the new status given to them by the Act.

24, Old Square, Lincoln's Inn,  
January, 1871.



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# MARRIED WOMEN'S PROPERTY.

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## INTRODUCTION.

THE rule laid down by Lord *Hardwicke* in *Peacock v. Monk* (2 Ves. 190), and re-stated and adopted by Lord *Thurlow* in the leading case of *Hulme v. Tenant* (1 Bro. C. C. 15), "that a *feme covert*, acting with respect to her separate property, is competent to act in all respects as if she was a *feme sole*" (*ibid.* p. 19) is the basis upon which is founded the equitable doctrine of separate estate. In Courts of Law a married woman, save in certain exceptional cases, as where the husband was an outlaw, had until the passing of the "Married Women's Property Act, 1870," no recognised status: her position was one of disability and immunity. In Courts of Equity the case was different; she was indeed held incapable of binding herself personally, but her rights and liabilities in respect of her separate property were fully recognised. To quote again from the judgment of Lord *Thurlow* in *Hulme v. Tenant*, "If a Court of Equity says a *feme covert* may have a separate estate, the Court will bind her to the whole extent, as to the making that estate liable to her own engagements, as for instance, for payment of debts" (*ibid.* p. 21).

Since the passing of the recent Act a great, if not a radical, change has been effected in the legal status of married women. They are now enabled to acquire, during the coverture, certain classes of property to their separate

Married woman's position in equity in respect of her separate estate.

Her status since the "Married Women's Property Act, 1870."



use under the Act, in respect of which they have an independent personal status in courts of law ; and are capable of taking all proceedings necessary for the protection and enjoyment of such property, freed from the disabilities which have hitherto attached to coverture. It does not appear, however, that, with certain exceptions to be hereafter noted (p. 9), the rights of creditors against their separate property are in any way varied by the Act. It will be necessary therefore, before dealing with the provisions of the Act, to consider briefly, what powers of disposition over their separate property have hitherto been enjoyed by married women, and what has been the extent and nature of their creditors' rights and remedies against such property.\*

Power of disposition over separate estate.

A married woman's power of disposing of her separate estate by act "*inter vivos*," or by will, has been held to extend to her personal property, whether in possession (*Fettiplace v. Gorges*, 1 Ves. 45), or in reversion (*Sturgis v. Corp*, 13 Ves. 190), and to her life interest in the rents and profits of real estate (*Stead v. Nelson*, 2 Beav. 245). The partiality, however, with which the rights of the heir have ever been regarded at Common Law, caused Courts of Equity in a long series of decisions to deny to married women the right to alienate the fee, though settled to their separate use, except by means of a fine or recovery, or since 1833 by deed duly acknowledged under the provisions of the Act (3 & 4 Will. 4, c. 74).

Power of alienating the equitable fee by deed or will, where legal estate in trustees.

This anomaly has now, after some conflict of decisions, been removed ; and since the case of *Taylor v. Meads* (34 L. J. (Ch.) 203 ; 13 W. R. 394), decided on appeal by *Westbury*, L.C., it may be considered as settled, that, where lands are vested in trustees to the separate use of a mar-

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\* See further, as to a married woman's rights and liabilities in respect of her separate property, Bright's Husband and Wife, and notes to *Hulme v. Tenant*, 1 White and Tudor's Leading Cases in Equity, 442 *et seq.* 3rd Edition.

ried woman in fee, she has a complete power of alienating the equitable fee, by deed, though not acknowledged under the statute, or by will.

In the recent case of *Pride v. Bubb* (L. R. 7 Ch. 64), where real estate was vested in trustees for the separate use of a married woman, under the provisions of a deed of separation duly executed by her husband and herself, it was decided by *Hatherley*, L.C., that she had a good power of disposition by will or deed unacknowledged. "It cannot," said his Lordship, "be now disputed that when a woman is the owner of real estate to her separate use, she is to all intents and purposes in the position of a *feme sole*, so as to be able to dispose of that estate by will or deed. The object of this deed is clearly to place this lady, with reference to all her real property whatsoever and wheresoever acquired, in exactly the same position as if she had no husband at all. If that had been so limited by a deed made anterior to her marriage, nobody disputes that the case would come precisely within the doctrine laid down by Lord *Westbury* (*vide Taylor v. Meads*), that she would hold as a *feme sole* and be able to make a will, the husband being placed out of the way."

In *Hall v. Waterhouse* (13 W. R. 633 ; 11 Jur. (N.S.) 361) it was decided that the right of alienating the equitable fee attaches where lands are vested in a married woman to her separate use without the intervention of trustees. In the latter class of cases, however, if it is desired to secure the protection of the legal estate, as for instance in a mortgage, the deed must still be acknowledged under the Act.

Though the cases above referred to extend only to the power of disposition by deed or will, it appears that the principle extends to instruments of a less formal nature. It is clear that, subject to the requirements of the Statute of Frauds being complied with, a married woman may bind her separate real estate by contract, and that specific

performance will be enforced by decree against her separate property (*Gaston v. Frankum*, 2 De G. & Sm. 561; *Picard v. Hine*, L. R. 5 Ch. 274).

Rights of creditors against the separate estate.

The history of the separate estate shows a gradual extension of the rights of creditors against such estate, where not protected by the restriction against anticipation. It was at first held that express charges alone would affect a married woman's separate property. After a time the rights of creditors claiming under a certain class of securities, such as bonds, bills of exchange, or promissory notes, were admitted against the separate estate, though not expressly referring thereto; and finally it has been decided that a married woman's general engagements, though not expressed in writing, will, with certain exceptions, bind her separate estate.

*Johnson v. Gallagher.*

The judgment of *Turner, L.J.*, in *Johnson v. Gallagher* (30 L. J. (Ch.) 298; 9 W. R. 506), where the cases are fully considered, and the principles regulating the rights of creditors are laid down with a fulness and precision which has since made it a leading case on the liability of married women in respect of their separate estate, will best illustrate the growth of the doctrine and the existing state of the law upon this point.

The bill in *Johnson v. Gallagher* was filed by the assignees in bankruptcy of a creditor of *Mrs. Gallagher*, to charge her separate estate, she having carried on a separate business apart from and with the consent of her husband. His Lordship, in his judgment, drew the following distinctions: "It has not, so far as I am aware, ever been disputed that married women may encumber their separate estates by mortgage or charge. When any question has arisen on such securities the question has been, not on the right to create the security, but upon the circumstances under which it has been created. . . .

Bonds, bills, and notes.

"Again, there are very many cases which have established that the bonds, bills of exchange, and promissory

notes of married women are payable out of their separate estates. . . .

"It has been a more disputed, and is a more doubtful question, whether the separate estates of married women are liable for their general engagements, such as tradesmen's bills and claims of that description. Looking at this question without reference to authorities, it is difficult to see upon what ground debts of this class can be distinguished from debts of the class to which I have last referred; what distinction there can for this purpose be between debts by specialty and debts by simple contract, and, still more, what distinction there can be between simple contract debts of different descriptions; and if no sound distinction can be drawn between the different classes of debts, the authorities which apply to the one class must, as it should seem, govern the other. . . . The weight of authority seems to me to be in favour of the liability; and I think, too, that the principle on which all the cases proceed, that a married woman in respect of her separate estate, is to be considered as a *feme sole*, is also in favour of it; and upon the whole, therefore, I have come to the conclusion that not only bonds, bills, and promissory notes of married women, but also their general engagements may affect their separate estates, except as the Statute of Frauds may interfere where the separate estate is real property. I am not prepared, however, to go the length of saying that the separate estate will in all cases be affected by a mere general engagement. . . . According to the best opinion which I can form on a question of so much difficulty, I think that, in order to bind the separate estate by a general engagement, it should appear that *the engagement was made with reference to and upon the faith or credit of that estate, and that whether it was so made or not is a question to be judged of by this Court upon all the circumstances of the case.*"

General engagements.

Exceptions:—

(1.) Under Statute of Frauds.

(2.) Where upon the evidence it does not appear that the engagement was entered into with reference to the separate estate.

His Lordship, after reviewing the authorities, on the

question whether there had been any contract binding the separate estate, proceeded as follows:—"The defendant, *Jane Gallagher*, at the time when the goods for which the plaintiffs claim to be paid were ordered and furnished, was living separate from her husband, and the evidence, I think, shows that the tradesmen who supplied the goods supposed and believed that she had separate estate, and dealt with her upon that assumption. So far, therefore, as they were concerned, they dealt on the footing of separate estate. How was it, then, on the part of the defendant, *Jane Gallagher*? She was, as I have said, living separate from her husband, and had separate estate, and I think that *where under such circumstances a married woman contracts debts, the Court is bound to impute to her the intention to deal with her separate estate, unless the contrary is clearly proved.* The Court cannot impute to her the dishonesty of not intending to pay for the goods which she purchased."

Specific assignment will take priority over general engagements.

On the whole case his Lordship dismissed the bill on the ground that an assignment by Mrs. *Gallagher* to secure an antecedent debt, though of all her property, and made after the filing of the bill, was upon the evidence good as against general creditors, who had no specific charge. This case should be carefully considered, as the principles there laid down will apparently govern the numerous questions, which must arise as to credit given to married women, carrying on a separate business under the 1st section of the "Married Women's Property Act, 1870." And see *Mrs. Matthewman's Case*, L. R. 3 Eq. 781; 36 L. J. (Ch.) 90; 15 W. R. 146; *Picard v. Hine*, L. R. 5 Ch. 274; 18 W. R. 178; *M'Henry v. Davies*, L. R. 10 Eq. 88; 18 W. R. 855.

Rights of creditors in administration of separate estate.

In administering the estate of a married woman after her decease, her separate property is treated as equitable assets, and is distributed among her creditors *pari passu* (*Owens v. Dickenson*, 1 Cr. & Ph. 48; *Gregory v. Lockyer*,

6 Madd. 90; *vide contra* *Shattock v. Shattock*, L. R. 2 Eq. 182). Certain *dicta* of Romilly, M.R., in *Shattock v. Shattock* (*ubi supra*) leave it doubtful how far general engagements, not expressly charging the separate estate, constitute debts proveable against that estate after death. The tendency of recent decisions, however, appears to be in favour of making a married woman's liabilities for her debts and engagements coextensive with her power of disposition over her separate property, and of sweeping away distinctions based on the form in which the obligation was contracted (*Picard v. Hine*, L. R. 5 Ch. 274; *M'Henry v. Davies*, L. R. 10 Eq. 88; 18 W. R. 855).

Before the Act separate property might have been created in various ways. Thus, as is laid down by Lord Langdale in *Tullett v. Armstrong* (1 Beav. 21), it may be acquired "either by contract with the husband before the marriage, or by gift from him or from any stranger wholly independent of such contract." It may also be created by special agreement between husband and wife after marriage (*Haddon v. Fladgate*, 1 Sw. & Tr. 48; *Pride v. Bubb*, L. R. 7 Ch. 64). If a wife is deserted by her husband, she is apparently entitled, apart from the provisions of 20 & 21 Vict. c. 85, s. 21, to hold property, acquired by her after desertion, to her separate use (*Cecil v. Juxon*, 1 Atk. 278). Where, also, after being judicially separated, the wife returns to cohabitation, under 20 & 21 Vict. c. 85, s. 25, she holds the property to her separate use.\*

Under the recent Act, a new class, which for the sake of distinction may be called statutory separate property, is created. A distinction must therefore now be taken between statutory separate property, to which alone, as it appears, the extended rights conferred on married women by the Act are intended to apply, and those interests which

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\* See Appendix, p. 32.

are still recognised as separate property in Courts of Equity alone.

Statutory

Under the first class will come all earnings acquired after the passing of the Act (August 9, 1870), in any trade or occupation which a married woman shall carry on separately from her husband, and all investments of such earnings (sect. 1); deposits or investments to a married woman's separate use under sects. 2, 3, 4, and 5; personal property without restriction as to nature or value devolving "*ab intestato*" on a woman married after the passing of the Act, as well as sums of money not exceeding 200*l.* to which she may become entitled under any deed or will (sect. 7); the rents and profits of real estate descending to her (sect. 8); and policies of insurance effected to a married woman's separate use (sect. 10). Property belonging to a woman before marriage, which her husband has by writing under his hand reserved to her separate use, will also apparently be statutory separate property, for the purposes of sect. 11.

Equitable.

Separate property arising in any of the modes indicated above, and not falling under the Act, will constitute the second class. It will be observed that an express trust for separate use will still be necessary as before the Act, in the case of real and personal property, other than sums of money not exceeding 200*l.*, left by deed or will. Property so limited to the separate use, unless it be property belonging to the wife "before marriage, and which her husband shall by writing under his hand have agreed with her shall belong to her after marriage as her separate property" within the meaning of sect. 11, will not carry with it the legal rights conferred by the Act, though it will apparently be subject to the liabilities now for the first time imposed upon married women by sects. 12, 13, and 14.

Investment  
clauses.

Married women are now enabled to invest their separate property in savings banks and government annuities

(sect. 2), in the public funds (sect. 3), in shares and debentures, to which no liability is attached, in any incorporated or joint-stock company (sect. 4), and in similar shares in friendly and benefit societies duly registered (sect. 5), so as to obtain a good legal title thereto, as statutory separate property. As between husband and wife it appears that these clauses cannot be intended to give more than a *prima facie* title, unless the investment is made with his consent, and that all equities are left untouched.

The rights of creditors of the husband are reserved by sect. 6, where property has been fraudulently settled by him on his wife; and the creditors are enabled to follow such property, as if the Act had not passed. Husband's  
creditors.

It does not appear that any remedy is given to the wife's creditors against her separate property at law, except in the cases falling within sects. 12, 13, and 14. In other cases, the creditor's remedy will probably be by bill in Chancery to charge her separate estate. See *Johnson v. Gallagher (ubi supra)*, and compare and distinguish the language of 20 & 21 Vict. c. 85, ss. 21, 26. (See Appendix). Wife's creditors.

Questions between husband and wife, in relation to separate estate made such by the Act, may, under sect. 9, be decided on summons or motion in a summary way in the existing Courts of equitable jurisdiction, without any limit as to the value of the property involved. It appears probable that the ordinary jurisdiction of Courts of Equity will be held to extend to statutory separate property, and that it will be in the discretion of the parties to choose their remedy under this section, or according to the ordinary practice, as the nature and complexity of the circumstances may require. Questions be-  
tween husband  
and wife.

The power which married women now possess of maintaining an action at law is confined to the cases arising on statutory separate property. It may, perhaps, be Wife's action at  
law.



doubtful whether a liability to be sued at law may not be held to result from this power (but see *supra*).

Wife responsible at law for debts contracted before marriage.

The husband is, under sect. 12, released from liability at law to be sued for his wife's debts contracted before marriage. Creditors have now, in respect of such debts, a legal remedy against the wife, who is liable to the extent of her separate property. The Act does not appear to provide for the case where property of the wife has, either innocently or by collusion, been permitted to vest in the husband on marriage, so as to defeat the rights of her creditors. It appears probable, however, that equity, by analogy to the cases of fraudulent settlements, will, on proof of the intention to defraud, give a remedy to the creditors against such property of the wife as has vested in the husband in his marital right.

Wife responsible at law for maintenance of husband and children.

By sect. 13, the wife, if possessed of separate property, is made liable to maintain her pauper husband; and by sect. 14, her children, when the father has ceased to maintain them, yet so as not to affect his primary liability. In both of these cases the usual legal remedies to procure payment are made applicable to married women.

The Act, which came into operation on the 9th of August, 1870, does not apply to Scotland. (Sects. 15 and 16).

# MARRIED WOMEN'S PROPERTY ACT, 1870.

(33 & 34 VICT. CAP. 93.)

*An Act to amend the Law relating to the Property of Married Women.* A.D. 1870.  
[9th August, 1870.]

WHEREAS it is desirable to amend the law of property and contract with respect to married women :

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :

I. The wages and earnings of any married woman acquired or gained by her after the passing of this Act in any employment, occupation, or trade (a) in which she is engaged or which she carries on separately from her husband (b), and also any money or property so acquired by her through the exercise of any literary, artistic, or scientific skill, and all investments (c) of such wages, earnings, money, or property, shall be deemed and taken to be property held and settled to her separate use (d), independent of any husband to whom she may be married, and her receipts alone shall be a good discharge for such wages, earnings, money, and property.

Earnings of married women to be deemed their own property.

(a) The protection afforded by the Act, in accordance with the general policy of the law, extends only to lawful occupations and trades. See *Mason v. Mitchell* (3 H. & C. 528; 34 L. J. (Ex.) 68) decided under 20 & 21 Vict. c. 85, s. 21, where property of the wife acquired by keeping a disorderly house was held not to be entitled to protection against the husband claiming in his marital right. Lawful occupations protected.

(b) Under the old law, an agreement between husband and wife, that she should carry on a separate business, if made before marriage, was not binding. Agreement between husband and wife.

and wife as to separate business.	riage, was binding both on the husband and his creditors—if after marriage, on the husband alone (2 Bright's 'Husband and Wife,' 293). This distinction, which was based on the wife's inability to contract during coverture will, it is submitted, now cease; and in either case the wife will be equally protected against claims made by her husband or his creditors under the powers given her by sects. 9 and 11. The question whether the business is carried on by her separately is one of evidence, to be determined on the circumstances of the case ( <i>Smallpiece v. Dawes</i> , 7 C. & P. 40). It is desirable that the husband should give his written consent to the carrying on of separate business by the wife, since such consent, in the absence of fraud or collusion, will be binding both on the husband and his creditors.
Onus of proof.	Married women being now capable of holding separate property at law, the onus of proof will lie upon those who claim adversely to them. And see note (g) to sect. 2.
What investments are within the Act.	(c) It does not appear that a married woman's power of investing her earnings under this section is to be restricted to those classes of investments for which special facilities are given by sects. 2, 3, 4, and 5; but that, on the contrary, all investments of such earnings, being "property by this Act declared to be her separate property," will carry with them the various legal rights and incidents conferred by the Act. Thus furniture, stock in trade, or plant purchased out of wages or earnings, will be as much separate property as the wages or earnings themselves; and this view of the construction to be put upon the section is confirmed by the language of sect. 11, which extends the civil and criminal remedies thereby given to any "chattels or other property purchased or obtained" by means of any "wages, earnings, money, and property," declared by the Act to be separate property.
Furniture, stock in trade.	
Real estate.	Where investments are made in real estate, the equitable fee may be disposed of by the wife, without the forms prescribed by the Act for the Abolition of Fines and Recoveries, by act <i>inter vivos</i> or by will ( <i>Taylor v. Meads</i> , 34 L. J. (Ch.) 203; 13 W. R. 394; <i>Hall v. Waterhouse</i> , 13 W. R. 633; 11 Jur. (N.S.) 361; <i>Pride v. Bubb</i> , L. R. 7 Ch. 64).
Purchased in part out of separate estate.	Where lands were purchased in part out of proceeds of the wife's separate estate and conveyed to her husband in fee, the wife was held entitled to a charge thereon for the amount so advanced by her with interest from the date of her husband's death ( <i>Scales v. Baker</i> , 28 Beav. 91; cf. <i>Darkin v. Darkin</i> , 17 Beav. 578).
Subject to debts.	Where no disposition has been made by the wife of her real estate, it will descend on her death to her heir, subject to the payment of her debts. It appears to be doubtful whether the husband can claim his estate by curtesy in his wife's separate estate of inheritance. In <i>Moore v. Webster</i> (L. R. 3 Eq. 267) the decision was against the husband's right; while the contrary conclusion was arrived at in the later case of <i>Appleton v. Rowley</i> (L. R. 8 Eq. 139).
Curtsey—query.	Where the separate use extends to the <i>life estate only</i> , there appears to be no doubt on the authorities as to the husband's right by curtesy. See cases cited in note (z), sect. 8.
Form of conveyance.	To avoid difficulties in dealing with the legal estate, the conveyance, in cases where land is acquired under this section, should

be taken to such uses as the wife shall appoint, and in default of appointment to her separate use in fee.

(d) The effect of the Act is to place women, whether married before or after the passing of the Act (August 9th, 1870), in the position of *femes sole* in respect of the beneficial enjoyment of property acquired after the Act by their industry or skill. As regards this class of property, and all other separate property made such by the Act, they have now a personal legal status, with power to enter into contracts, give receipts, and pursue their remedies, civil and criminal, in relation to such separate property in their own name, free from the incapacities hitherto consequent on coverture; while at the same time they apparently retain, with the exceptions falling within sects. 12, 13, and 14, the personal immunity from adverse legal proceedings which they have hitherto enjoyed. They may deal with such separate property during their lifetime, or dispose of it by will on their death, free from the control of their husbands. Questions arising during the coverture between husband and wife, with regard to separate property made such by the Act, may under sect. 9 be settled in a summary way by summons or motion in the Court of Chancery or County Court, without restriction as to the amount of the property in question.

Rights and liabilities under the Act in respect of separate estate.

On the death of the wife intestate, the husband will succeed to her real estate as tenant by the curtesy, where such right exists,—see note (c) *supra* and note (z) to sect. 8; and to her personal estate if in action, as her administrator (*Proudley v. Fielder*, 2 My. & K. 57), if in possession, in his marital right (*Molony v. Kennedy*, 10 Sim. 254).

Husband's rights on death of wife intestate

The separate property of a married woman will be liable during her lifetime in Courts of Equity to satisfy the demands of creditors, whose debts are either expressly or by implication charged thereon (*Johnson v. Gallagher*, 30 L. J. (Ch.) 298; 9 W. R. 506), and after her death her creditors may file a bill for the administration of her estate, which is treated as equitable assets, all debts being paid *pari passu* (*Owens v. Dickenson*, 1 Cr. & Ph. 48, see p. 6, *supra*). See also 32 & 33 Vict. c. 46, by which the priority of specialty over simple contract creditors is abolished in the administration of the estates of all persons dying after the 1st day of January, 1870.

Creditor's right in suit for administration.

As to proceedings in cases between husband and wife, see note (b) to sect. 9, and against strangers, note (f) to sect. 11.

II. Notwithstanding any provision to the contrary in the Act of the tenth year of George the Fourth, chapter twenty-four, enabling the Commissioners for the Reduction of the National Debt to grant life annuities and annuities for terms of years, or in the Acts relating to savings banks and post-office savings banks, any deposit hereafter made and any annuity granted by the said Commissioners under any of the said Acts in the name of a married woman (e), or in the name of a woman who may marry after such

Deposits in savings banks by a married woman to be deemed her separate property.

Proviso. deposit or grant (*f*), shall be deemed (*g*) to be the separate property of such woman, and the same shall be accounted for and paid to her as if she were an unmarried woman; provided that if any such deposit is made by, or such annuity granted to, a married woman by means of moneys of her husband without his consent (*h*), the Court may, upon an application under Section 9 of this Act, order such deposit or annuity or any part thereof to be paid to the husband.

Husband's right to wife's annuity or deposits. (*e*) Under the old law the position of married women as regards deposits in savings banks and government annuities was precarious and uncertain. The husband, if he were so minded, could draw the deposit or claim the annuity in his wife's name on proof of the marriage; 26 & 27 Vict. c. 87, s. 31. Under the present section the wife has now a legal title to deposits or annuities standing in her own name, subject, however, to the husband's equities, where such exist. See notes (*f*) and (*h*) *post*.

Annuities inalienable except on bankruptcy. If it should be held that married women are not within the scope of the Bankruptcy Laws, it seems that government annuities held by them are, under 16 & 17 Vict. c. 45, s. 25, absolutely inalienable, and cannot be made available for payment of their debts during coverture.

As to a married woman's rights and liabilities in respect of her separate property see note (*d*) sect. 1.

Fraud on marital rights. (*f*) Property belonging to a woman before marriage cannot be validly appropriated to her separate use, except with the consent of her intended husband. Any such disposition without his consent will be held in equity a fraud on his marital rights. See note (*i*), sect. 3.

Onus of proof. (*g*) Formerly, as separate property was not recognised at law, the onus was thrown upon the married woman of proving her title to such property. Now, in all cases of statutory separate property, the wife having at law a good *prima facie* title, it will lie upon those who claim adversely to her to prove that property *alleged to be her separate property* within the meaning of the Act, is not in fact her separate property. As to the onus of proof see observations of Wood, V.C., in *Barrack v. M'Culloch* (3 K. & J. 119, 120), and see note (*f*), sect. 11.

Husband's equities reserved under proviso. (*h*) By this proviso the rights of the husband are reserved, where moneys, either his own or coming to him in right of his wife, have been invested by her without his consent to her separate use. Subject to any right of set-off claimed by the wife, the husband is enabled under the 9th section to recover such moneys in a summary way. Sects. 3, 4, and 5 contain similar provisions. As to what personal property of the wife still vests in the husband in his marital right see note (*x*), sect. 7. As to the rights of creditors of the husband, where he has transferred property of his own to his wife's separate use, see note (*v*), sect. 6.

III. Any married woman, or any woman about to be married (*i*), may apply to the Governor and Company of the Bank of England, or to the Governor and Company of the Bank of Ireland, by a form to be provided by the governor of each of the said banks and company for that purpose, that any sum forming part of the public stocks and funds (*k*), and not being less than twenty pounds, to which the woman so applying is entitled, or which she is about to acquire, may be transferred to or made to stand in the books of the governor and company to whom such application is made in the name or intended name of the woman as a married woman entitled to her separate use, and on such sum being entered in the books of the said governor and company accordingly the same shall be deemed (*l*) to be the separate property of such woman, and shall be transferred and the dividends paid as if she were an unmarried woman; provided that if any such investment in the funds is made by a married woman by means of moneys of her husband without his consent (*m*), the Court may, upon an application under section nine of this Act, order such investment and the dividends thereof, or any part thereof, to be transferred and paid to the husband.

As to a married woman's property in the funds.

(*i*) The effect of this section is, to enable women during coverture to hold sums of stock of 20*l.* and upwards to their separate use without the intervention of trustees. As to their rights and liabilities in respect of such stock, see note (*d*), sect. 1. The section applies equally to women married before and after the 9th of August, 1870. An unmarried woman can avail herself of its powers only in contemplation of marriage, wherefore any transfer of stock to her separate use cannot be safely made without the concurrence of her intended husband. Unless made with his consent, expressed or implied, a transfer under this section would be voidable by him as a settlement in fraud of his marital rights.\* (See *Countess of* husband.

Transfer of stock.

When void against the husband.

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\* The forms of application furnished by the Bank of England under this section provide for the concurrence of the husband or intended husband in such application. It is understood that the Bank will not refuse to register, though the consent of the husband has not been obtained.

*Strathmore v. Bowes*, 1 Ves. Jun. 22, and notes thereto, 1 Wh. and Tu. L. C. 372, *et seq.* 3rd Ed.)

It has been held to be immaterial that the husband before marriage was ignorant of the existence of the property (*Goddard v. Snow*, 1 Russ. 485). Actual fraud or deception practised on the husband need not be proved; suppression of the fact of the settlement will be constructive fraud (*St. George v. Wake*, 1 My. & K. 610; *Downes v. Jennings*, 32 Beav. 290). If, however, the husband becomes aware before marriage of the reservation of separate property by the wife, his subsequent marriage will be held an implied consent to such disposition of her property, and a waiver of his right to set it aside (*St. George v. Wake*, 1 My. & K. 622; *Ashton v. M'Dougall*, 5 Beav. 56).

Transfer of  
fund in Court  
with consent of  
the husband.  
Not where  
woman a ward  
of Court.

Public stocks  
and funds,  
what.

Where a married woman was entitled for life to the income of a sum of consols, the Court, under this section, *with the consent of the husband* and the reversioner, ordered a transfer into her name as a married woman entitled to her separate use (*In re Bartholomew's Estate*, W. N. 1870, 234; 19 W. R. 95); but where the woman was a ward of Court, the fund was ordered to be settled on her (*In re Butlin's Trusts*, W. N. 1870, 251; 23 L. T. (N.S.) 523; 19 W. R. 241).

(*k*) As to what is meant by "public stocks and funds," see Davidson's 'Precedents and Forms in Conveyancing,' vol. iii. p. 547, note (*h*), 2nd Ed.

(*l*) See note (*g*), sect. 2.

(*m*) See note (*h*), sect. 2.

As to a married  
woman's pro-  
perty in a joint-  
stock company.

IV. Any married woman, or any woman about to be married (*n*), may apply in writing to the directors or managers of any incorporated or joint stock company that any fully paid up shares, or any debenture or debenture stock, or any stock of such company, to the holding of which no liability is attached, and to which the woman so applying is entitled (*o*), may be registered in the books of the said company in the name or intended name of the woman as a married woman entitled to her separate use, and it shall be the duty of such directors or managers to register such shares or stock accordingly, and the same upon being so registered shall be deemed (*p*) to be the separate property of such woman, and shall be transferred and the dividends and profits paid as if she were an unmarried woman; provided that if any such investment as last mentioned is made by a married woman by means of moneys of her husband without his consent (*q*), the Court may, upon an application under Section nine of this

Act, order such investment and the dividends and profits thereon, or any part thereof, to be transferred and paid to the husband.

(n) As to fraud on marital rights, in the registration of shares under this section, see note (i) to sect. 3. Fraud on marital rights.

(o) A married woman, or a woman about to be married, may now claim as of right to be the registered legal owner of stock and shares incorporated or joint stock company, as her separate property. As to her rights and liabilities in respect of such property see note (d), sect. 1. It is to be observed that the present section does not in terms provide for the compulsory registration of shares which a married woman intends to acquire to her separate use. Compare and distinguish in this respect the previous section. However, even before the passing of the Act, there was nothing in the nature of a joint-stock company which, apart from special prohibitory clauses, prevented a married woman, possessed of separate estate, from contracting in equity to take, and from holding in her own name, stock or shares of any description as her separate property (*Mrs. Matthewman's Case*, L. R. 3 Eq. 781; 36 L. J. (Ch.) 90; 15 W. R. 146; *Butler v. Cumpston*, L. R. 7 Eq. 16; 38 L. J. (Ch.) 35; 17 W. R. 24). Equity will therefore protect property of this nature, even where the legal title cannot be obtained under the present section. If such property represent investments of earnings under sect. 1, it will apparently possess the additional incidents of statutory separate estate. See note (b) to sect. 9, and (f), sect. 11. A married woman may be made a contributory in respect of her separate estate (*Mrs. Matthewman's Case*, *supra*). Married woman a contributory.

(p) See note (g) to sect. 2.

(q) See note (h) to sect. 2.

V. Any married woman, or any woman about to be married (r), may apply in writing to the committee of management of any industrial and provident society, or to the trustees of any friendly society, benefit building society, or loan society, duly registered, certified, or enrolled under the Acts relating to such societies respectively, that any share, benefit, debenture, right, or claim whatsoever in, to, or upon the funds of such society, to the holding of which share, benefit, or debenture no liability is attached, and to which the woman so applying is entitled, may be entered in the books of the society in the name or intended name of the woman as a married woman entitled to her separate use (s), and it shall be the duty of

As to a married woman's property in a society.



such committee or trustees to cause the same to be so entered, and thereupon such share, benefit, debenture, right, or claim shall be deemed (t) to be the separate property of such woman, and shall be transferable and payable with all dividends and profits thereon as if she were an unmarried woman; provided that if any such share, benefit, debenture, right, or claim has been obtained by a married woman by means of moneys of her husband, without his consent (u), the Court may, upon an application under Section nine of this Act, order the same and the dividends and profits thereon, or any part thereof, to be transferred and paid to the husband.

Fraud on marital rights.

(r) As to fraud on marital rights, see note (z), sect. 3.

What shares, benefits, and debentures are within the section.

(s) The application of this section is restricted to the case of shares, benefits, and debentures, to which a woman, married or about to marry, is entitled (see note (o), sect. 4), and to which no liability is attached. The ordinary shares in such societies, which involve periodic payments, will therefore not come within its scope. It will, however, probably afford to married women an accessible mode of investment for small sums, now that it has been decided that a rule authorizing societies, constituted under 6 & 7 Will. 4, c. 32, to borrow within reasonable limits is not illegal under the statute (*Laing v. Reed*, L. R. 5 Ch. 4; 18 W. R. 76; 39 L. J. (Ch.) 1). As to the incidents of such shares and debentures, when entered as separate property under the Act, see note (d) to sect. 1.

It is to be observed, that shares in freehold land societies are not within the section. The cases show, that societies having for their object the acquisition of land, cannot be legally constituted under any of the building or benefit societies' Acts. See *Grimes v. Harrison*, 26 Beav. 435; *Hughes v. Layton*, 10 Jur. (N.S.) Q. B. 513, s. c. *sub. nom. Hughes v. D'Eyncourt*, 12 W. R. 408.

Title in equity to shares not within the section.

As regards shares and interests, which whether as involving future liabilities, or for other reasons, do not come within the section, it is submitted that the principle of *Mrs. Matthewman's Case* (L. R. 3 Eq. 781; 36 L. J. (Ch.) 90; 15 W. R. 146) must be held to apply, and that married women possessed of separate estate may contract to take such shares and interests, and may acquire a good equitable title thereto, as their separate property. And see note (o), sect. 4.

(t) See note (g) to sect. 2.

(u) See note (h) to sect. 2.

Deposit of moneys in fraud of creditors invalid.

VI. Nothing hereinbefore contained in reference to moneys deposited in or annuities granted by savings banks, or moneys invested in the funds, or in shares, or

stock of any company shall, as against creditors of the husband, give validity to any deposit or investment of moneys of the husband made in fraud of such creditors (v), and any moneys so deposited or invested, may be followed as if this Act had not passed.

(v) The powers given to married women by the preceding sections, of holding separate property free from the rights and control of their husbands, will afford to dishonest debtors facilities for making fraudulent investments in their wives' names. The present section reserves the rights of creditors against property so invested and settled; and enables them to follow it as if this Act had not passed. In such cases the transfer, though fraudulent against creditors, will be binding on the husband. See *Groves v. Groves*, 3 Yo. & Jer. 163.

The rights of creditors will, however, it is conceived, by analogy to the law of fraudulent settlements, vary according to circumstances. Thus, if a settlement has been made on the wife, in contemplation of marriage, or for other valuable consideration, the onus is on the creditors to prove actual intention to defraud. (*Holmes v. Penney*, 3 K. & Jo. 90.) The consideration of marriage will not prevail if part of a scheme to defraud creditors (*Colombine v. Penhall*, 1 Sm. & Giff. 228; *Bulmer v. Hunter*, L. R. 8 Eq. 46; 38 L. J. (Ch.) 543). If, on the other hand, the settlement is voluntary, it is sufficient to prove constructive fraud, which will be presumed from a variety of circumstances. Thus, where a settlor, solvent at the date of the settlement, was thereby left without funds sufficient immediately to pay his debts, and subsequently it proved, that a creditor was in fact hindered and delayed in recovering his debt, such settlement was set aside as fraudulent and void (*Freeman v. Pope*, L. R. 5 Ch. 538). And a subsequent creditor, who can prove the existence of a debt incurred prior to the settlement, may procure the settlement to be set aside, and rank as a creditor against the settled property (*ibid*). And see *Jenkyn v. Vaughan*, 3 Drew, 419. And as to fraudulent settlements, see notes to *Twyne's Case*, 1 Sm. L. C. 10 *et seq.*, 6th Ed., and notes to *Ellison v. Ellison*, 1 Wh. & Tu. L. C. 232 *et seq.*, 3rd Ed.

As to onus of proof, see note (g), sect. 2.

VII. Where any woman married after the passing of this Act shall during her marriage become entitled (w) to any personal property as next of kin or one of the next of kin of an intestate, or to any sum of money (x) not exceeding two hundred pounds under any deed or will, such property shall, subject and without prejudice to the trusts of any settlement affecting the same, belong to the woman

Personal property not exceeding £200 coming to a married woman to be her own.

for her separate use, and her receipts alone shall be a good discharge for the same (y).

Section does not apply to women married before the Act.	(w) The benefit of this section is restricted to women married after the passing of the Act, who have not by settlement contracted themselves out of its provisions. It differs in its language from the following section, the application of which is not in terms limited to interests accruing to the wife <i>during coverture</i> . See note (z), sect. 8. The wording of the section suggests a doubt whether sums of money under 200 <i>l.</i> which may have vested subject to a contingency or in remainder under any deed or will prior to marriage, but fall into possession during the coverture, are within the Act. It does not, however, appear that the construction to be put upon the word "entitled" has as yet been determined by judicial decision.
Doubtful whether to contingent interests accruing before coverture.	(z) The marginal note to this section is inaccurate. The character of separate estate is now impressed upon all personalty, without restriction as to its nature or value, to which a woman becomes entitled during coverture as next of kin or one of the next of kin of an intestate. Where, however, personal property is acquired by deed or will, sums of money not exceeding 200 <i>l.</i> will alone come within the section. It appears, however, by analogy to the cases decided on covenants to settle after-acquired property, that where more than one legacy or a legacy and share of residue, severally within, but in the aggregate exceeding, the amount of 200 <i>l.</i> , are bequeathed by the same will, that the benefit of the section may be claimed in respect of each several amount. ( <i>Re Middleton's Will</i> , 16 W. R. 1107). As to interests accruing under deeds, see <i>Bower v. Smith</i> , L. R. 11 Eq. 279. As to what is held to pass under a gift of "money," see <i>Lowe v. Thomas</i> , 5 De G. M. & G. 315, and 1 Jarm. on Wills, 730, note (k), 3rd Ed.
Share under Statutes of Distribution.	(x) The marginal note to this section is inaccurate. The character of separate estate is now impressed upon all personalty, without restriction as to its nature or value, to which a woman becomes entitled during coverture as next of kin or one of the next of kin of an intestate. Where, however, personal property is acquired by deed or will, sums of money not exceeding 200 <i>l.</i> will alone come within the section. It appears, however, by analogy to the cases decided on covenants to settle after-acquired property, that where more than one legacy or a legacy and share of residue, severally within, but in the aggregate exceeding, the amount of 200 <i>l.</i> , are bequeathed by the same will, that the benefit of the section may be claimed in respect of each several amount. ( <i>Re Middleton's Will</i> , 16 W. R. 1107). As to interests accruing under deeds, see <i>Bower v. Smith</i> , L. R. 11 Eq. 279. As to what is held to pass under a gift of "money," see <i>Lowe v. Thomas</i> , 5 De G. M. & G. 315, and 1 Jarm. on Wills, 730, note (k), 3rd Ed.
By deed or will.	(y) Payment of a fund in Court may, it is conceived, within the limits of this section, now be made to a married woman on her sole receipt, without any other inquiry than as to the existence of a
How far limitation to separate use still necessary.	With the above exception, an express limitation to separate use will still be necessary, where it is intended to secure personal property by deed or will to married women, as the section does not affect personalty acquired before marriage, or leaseholds, stock, shares, &c., coming to women by deed or will after marriage. Such personalty, in default of the limitation to separate use, will still vest in the husband in his marital right, and the wife will be left to claim her equity to a settlement as before the Act. It does not appear that paraphernalia, or gifts of jewellery or trinkets made to the wife are within the section. The latter class of property, however, is usually held separate property in equity. ( <i>Graham v. Londonderry</i> , 3 Atk. 394). As to trust estates, see note (u), sect. 8.
Gifts of jewellery.	Unless the property be reduced into possession by the wife, the quality of separate estate ceases at her death, and the husband as her administrator becomes entitled thereto, subject to the payment of her debts. She may, however, dispose of outstanding or reversionary separate property during her lifetime or by will ( <i>Sturgis v. Corp</i> , 13 Ves. 190; <i>Lechmere v. Brotheridge</i> , 32 Beav. 353, 369; 11 W. R. 814).
Husband's rights in deceased wife's personalty.	
Payment out of Court to married woman.	

settlement; the saving in favour of the trusts of any settlement affecting the fund will keep alive the restriction against anticipation, which has been held to be destroyed in the case of a woman who had obtained a protection order under 20 & 21 Vic. c. 85, s. 21, by which Act the power of giving receipts is left unqualified and absolute (*Cooke v. Fuller*, 26 Beav. 99).

VIII. Where any freehold, copyhold, or customaryhold property shall descend upon any woman married after the passing of this Act as heiress or co-heiress of an intestate (z), the rents and profits (a) of such property shall, subject and without prejudice to the trusts of any settlement affecting the same, belong to such woman for her separate use, and her receipts alone shall be a good discharge for the same.

Freehold property coming to a married woman, to be her own.

(z) The marginal note to this section is again misleading. The section does not extend to lands acquired by conveyance, devise, or otherwise than by descent; the limitation for separate use is therefore necessary in all cases, as before the Act. Its application is not in terms restricted to lands descended during the coverture.

Section confined to lands descended.

A woman, married after the passing of the Act, will be entitled to the rents and profits of real estate, to which she may become entitled as heiress or co-heiress of an intestate, to her separate use for life, subject to the trusts of any settlement affecting the same, and will have the same proprietary rights over such separate estate as a *feme sole*. The Act does not, however, affect her rights over the fee, but leaves her as before, unable to deal with it, except under the provisions of the Act for the Abolition of Fines and Recoveries (*Lechmere v. Brotheridge*, 32 Beav. 353; 11 W. R. 814). On the other hand, since the character of separate estate ceases on her death, the reversion in fee will not be subject to her debts. For the same reason she cannot dispose of it by will, nor will her husband's title as tenant by the curtesy be excluded. Subject therefore to the tenancy by the curtesy, where existent, the fee will descend to her heir (*Morgan v. Morgan*, 5 Mad. 408; *Follet v. Tyrer*, 14 Sim. 125).

Rents and profits to separate use for life.

Power to dispose of the fee by deed acknowledged.

Tenancy by the curtesy.

Arrears of rent will, on the death of the wife without disposing thereof during her lifetime or by will, belong to her husband surviving as her administrators, subject to the payment of her debts. (*Hearle v. Greenbank*, 3 Atk. 718).

Arrears of rent.

(a) The terms of this section, no less than the general scope and object of the Act, appear to indicate that it is designed to protect beneficial interests alone of married women from marital control; and that it is not intended to apply to estates and interests vested in them in a fiduciary capacity. It is conceived, therefore, that a married woman, acting as trustee or executrix, is still subject to the same incapacities as heretofore. Compare and distinguish the lan-

Trust estates.

guage of 20 & 21 Vict. c. 85, s. 21, amended by 21 & 22 Vict. c. 108, s. 7,\* which expressly provides for the case of trust estates. And see the observations of *Wood, V.C.*, in *Bathe v. Bank of England*, 4 K. & J. 564.

How questions  
as to owner-  
ship of property  
to be settled.

† [Sic]

IX. In any question between husband and wife as to property declared by this Act to be the separate property of the wife (b), either party may apply by summons or motion in a summary way either to the Court of Chancery in England or Ireland, according as such property is in England or Ireland, or in England (irrespective of the value of the property) † the Judge of the County Court of the district in which either party resides, and thereupon the Judge may make such order, direct such inquiry, and award such costs as he shall think fit; provided that any order made by such Judge shall be subject to appeal in the same manner as the order of the same Judge made in a pending suit or on an equitable plaint would have been, and the Judge may, if either party so require, hear the application in his private room.

Section does not  
extend to equit-  
able separate  
property.

(b) Questions arising between husband and wife in relation to separate property may now be decided in a summary way under this section. A distinction must, however, as it appears, be drawn between "property declared by this Act to be the separate property of the wife" and those classes of separate property which, not coming within the scope of the Act, will still be recognised as such in Courts of Equity alone. Property settled by the husband or third parties on the wife to her separate use in the ordinary way will apparently fall under the latter head, and see note (x) to sect. 7. With regard to the former class of statutory separate property, proceedings may now be taken by either husband or wife, in a summary way by summons or motion without bill filed, in the Court of Chancery or in the County Courts, irrespective of the value of the property involved.

Injunction  
against hus-  
band's inter-  
ference in sepa-  
rate business.

Under its protective jurisdiction the Court of Chancery will restrain a husband by injunction from interfering with his wife's separate business, and, under special circumstances, from entering her house. (*Green v. Green*, 5 Hare, 400 (note); *Wood v. Wood*, 19 W. R. 1049). In the latter case, the objection that the injunction, if granted, would in effect operate as a divorce *a mensa et thoro*, was met by the suggestion that the husband, if he chose, might petition for a restitution of conjugal rights.

\* See Appendix. .

As to questions in relation to property appropriated or settled to the wife's separate use under the Act, in fraud of her husband's marital rights, see note (i), sect. 3. And where, after marriage, moneys of the husband have been similarly appropriated without his consent, such moneys and all investments thereof will remain in equity his property (*Barrack v. McCulloch*, 3 K. & J. 114). The savings of the wife, from an allowance made to her by her husband for household purposes, cannot without his consent be invested to her separate use; unless she be living separate from him (*Brooke v. Brooke*, 25 Beav. 342). And see note (h), sect. 2. As to the onus of proof in such cases see note (g), sect. 2; and under the old law, *Grant v. Grant*, 13 W. R. 1057.

Where, on the other hand, separate property of the wife has come into the possession of the husband, the wife being in relation to such separate property in the position of a *feme sole*, will be bound by her dealings relating thereto (*Pawlet v. Delvil*, 2 Ves. 663); and will obtain relief only on proof of fraud, duress, or the like on the part of the husband (*Ibid.*; *Essex v. Atkins*, 14 Ves. 542). But the course of dealing must be distinctly proved, and the intention of the wife to make over her property to her husband be clear, as the Court will not raise a presumption against her (*Rich v. Cockell*, 9 Ves. 369). On the other hand, there must be corroborative evidence to establish a gift from husband to wife (*Grant v. Grant*, 13 W. R. 1057).

Tacit acquiescence, however, in the receipt of income of separate estate by the husband will disentitle the wife to an account against him (*Caton v. Rideout*, 1 Mac. & G. 599; *Payne v. Little*, 26 Beav. 1); secus where the wife has not consented (*Parker v. Brooke*, 9 Ves. 583) or where the husband has received the income to her use (*Darkin v. Darkin*, 17 Beav. 578). And the wife may sue her husband in equity, or prove against his estate after his death, for sums advanced to him by way of loan (*Woodward v. Woodward*, 3 De G. J. & S. 672; 11 W. R. 1007).

The evidence of the wife against her husband in his lifetime is apparently inadmissible in questions relating to separate estate (Alcock v. Alcock, 5 De G. & Sm. 671), but not after his death (*Woodward v. Woodward*, *supra*) and the disability is mutual. See note (g), sect. 11.

X. A married woman may effect a policy of insurance upon her own life or the life of her husband for her separate use (e), and the same and all benefit thereof, if expressed on the face of it to be so effected, shall enure accordingly, and the contract in such policy shall be as valid as if made with an unmarried woman.

A policy of insurance effected by any married man on his own life (d), and expressed upon the face of it to be for the benefit of his wife or of his wife and children (e),

Fraud on husband.

Savings from allowance.

Relief in cases of fraud or duress.

Evidence of gift.

Acquiescence.

Loan to husband.

Evidence of husband and wife.

Married woman may effect policy of insurance.

As to insurance of a husband for benefit of his wife.

or any of them, shall enure and be deemed a trust for the benefit of his wife for her separate use, and of his children, or any of them, according to the interest so expressed. and shall not, so long as any object of the trust remains, be subject to the control of the husband or to his creditors, or form part of his estate. When the sum secured by the policy becomes payable, or at any time previously, a trustee thereof may be appointed by the Court of Chancery in England or in Ireland, according as the policy of insurance was effected in England or in Ireland, or in England by the Judge of the County Court of the district, or in Ireland by the Chairman of the Civil Bill Court of the division of the county in which the insurance office is situated, and the receipt of such trustee shall be a good discharge to the office. If it shall be proved that the policy was effected and premiums paid by the husband with intent to defraud his creditors, they shall be entitled to receive out of the sum secured an amount equal to the premiums so paid.

insurances by  
life,

premiums paid  
out of moneys  
of husband.

settlement  
by wife by  
means of policy  
for separate use.

in children.

(c) Insurances by married women, if not altogether unknown, have hitherto been rarely effected, owing to the incapacity of the wife to contract, except as the agent of her husband, and subject to his right to adopt her contracts for his own advantage. A married woman will now be able to insure her own or her husband's life, and thereby to secure a fund to her separate use, which she may dispose of by will or otherwise at her sole discretion. Where premiums have been paid out of moneys of the husband without his consent, he will probably be held to have a lien in equity on the policy moneys to the extent of such premiums. See *Norris v. Caledonian Insurance Company*, L. R. 8 Eq. 127. On the death of the wife, without having made any disposition of the fund insured, the husband, as her administrator, will become entitled thereto, subject to the payment of her debts. As to the insurable interest of the wife in her husband's life, see *Reed v. Royal Exchange Assurance Company*, Peake's Add. Ca. 70.

(d) By means of a policy effected under this section, a married man is enabled indefeasibly to settle a fund on his wife or children payable at his death, subject to the deduction of a sum equivalent to such premiums, if any, as shall be proved to have been paid by him in fraud of his creditors; and reverting to him on the failure of the objects for which the policy purports to have been effected. A policy expressed to be for the benefit of children will be absolutely inalienable, so long as there are infant children, or the possibility

of issue, of the marriage. As to fraud on creditors see note (v) to sect. 6.

(e) Under the County Courts Equitable Jurisdiction Act, 1865 (28 & 29 Vict. c. 99, s. 1) the County Courts have jurisdiction in all proceedings relating to the maintenance or advancement of infants, in which the property of the infant shall not exceed in amount or value 500*l*. County Court jurisdiction over infants.

XI. A married woman may maintain an action in her own name (f) for the recovery of any wages, earnings, money, and property by this Act declared to be her separate property, or of any property belonging to her before marriage, and which her husband shall, by writing under his hand, have agreed with her shall belong to her after marriage as her separate property, and she shall have in her own name the same remedies, both civil and criminal, against all persons whomsoever for the protection and security of such wages, earnings, money, and property, and of any chattels or other property purchased or obtained by means thereof for her own use, as if such wages, earnings, money, chattels, and property belonged to her as an unmarried woman (g); and in any indictment or other proceeding it shall be sufficient to allege such wages, earnings, money, chattels, and property to be her property. Married women may maintain an action.

(f) This section effects an important change in the status of married women. Before the Act a *feme covert*, unless in certain exceptional cases, as where the husband was a convict or an outlaw, was not recognised as having any personal existence at law apart from her husband; and in equity only if, and so far as, she was possessed of separate property; a qualification which it lay upon her to establish, before she could obtain a hearing. See *Barwick v. M<sup>c</sup> Culloch*, 3 K. & J. 119, 120. Now the onus is shifted, and an allegation by the wife, that the property is her separate property, is sufficient both at law and in equity to give the Courts jurisdiction, and to make a *prima facie* case. Personal status of married woman at law. Onus of proof.

Further, where a married woman claims to be possessed of separate property made such by the Act, see note (b) to sect. 9, or of property which belonged to her before marriage, which her husband by writing under his hand (such writing apparently to be given before marriage) has agreed shall belong to her after marriage as her separate property, she has an independent personal status, so far as is necessary for the beneficial enjoyment and protection of such property; and may pursue all remedies civil and criminal in relation thereto in her own name without necessarily bringing her hus- Civil and criminal remedies for recovery or protection of separate property.



- Breach of contract. band before the Court. It may be a question whether the section gives a right of action in cases not directly involving the recovery or protection of separate property, as for a breach of contract in relation to a separate business. It is presumed that in all cases within the section the wife may now sue in equity without a next friend. It may however, be a question whether the defendant will not then be entitled to apply for security for costs (*Picard v. Hine*, L. R. 5 Ch. 275). For the same reason, in like cases, it appears that a bill by the wife will not be open to demurrer for lack of parties where the husband is not before the Court; yet circumstances may render it necessary or expedient that he should as heretofore be made a defendant.
- Next friend.
- Whether husband a party.
- Married woman a defendant. It will be observed that though a married woman is entitled to maintain an action, there is nothing apparently in the Act, with the exception of the cases provided for by sects. 12, 13, and 14, to alter the existing practice, where she is made a defendant.\*
- Plea of coverture. Thus in *Hutton v. Marriott* (reported 15 Solicitor's Journal, 289), where the plaintiff sued a married woman, carrying on a separate business and living at a distance from her husband, for salary and wrongful dismissal, a plea of coverture was held good. The judgment delivered by *McTaggart*, Judge in the Northampton County Court, in this case, indicates various points, which may arise for decision under this section of the Act.
- Bankruptcy. It appears probable that married women, if possessed of separate property, will now be liable to be made bankrupts. They are recognised at law as competent to contract and may be sued in certain cases. The old ground of their immunity therefore no longer exists (2 Bright's H. & W. 301; *Marshall v. Rutton*, 8 T. R. 545). See also *Ex parte Currington* (1 Atk. 206), where a *feme covert* trading by the custom of the city of London, and *Ex parte Franks* (7 Bing. 762), where the wife of a convict, were adjudicated bankrupts.
- Franchise. The Act does not affect the disability, to which women have hitherto been subject, in respect to the franchise (*The Queen v. Harrauld*, L. R. 7 Q. B. 363).
- Privilege between husband and wife. (g) It is conceived that there is nothing in the statute to vary the rule, by which communications between husband and wife, made during the marriage, are held privileged and inadmissible in evidence, such privilege being based on general grounds of public policy. See *Taylor on Evidence*, 5th Ed. pp. 802 and 1170, and *Alcock v. Alcock*, 5 De G. & Sm. 671.
- Criminal proceedings against husband. The language of the section is apparently wide enough to enable a wife to proceed criminally against her husband, where necessary for the protection and security of her separate property. It may, however, be contended, that the legislature in giving a civil remedy (sect. 9) in questions between husband and wife, has indicated an intention that that remedy and no other shall be available in questions arising under the Act. In any event it is conceived that there would be considerable practical difficulty in proving the *animus furandi*, if the husband were prosecuted for larceny of his wife's separate chattels.

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\* Distinguish 20 & 21 Vict. c. 85, ss. 21, 26 (Appendix).

The wife having now a personal right of action in respect of her statutory separate estate, coverture will probably in such cases cease to be a disability within the meaning of the Statutes of Limitation. Whether cover- ture a disability.

Query—whether the statutory right of action here given may not affect the husband's title to his wife's negotiable securities, and whether an indorsee from him of a bill or note made payable to his wife, will not now be held to be put upon inquiry as to the nature of the wife's interest therein. See *Dawson v. Prince*, 2 De G. & Jo. Husband in- dorsing his wife's note.

41. And query—whether the doctrine laid down in *White v. Cohen* (1 Drew. 312) may not be also affected, where, on a bill by a married woman to restrain a nuisance affecting her separate property, an injunction was refused, on the ground of her personal incapacity to maintain an action at law. See also note (6) sect. 9. Injunction at suit of wife.

XII. A husband shall not, by reason of any marriage which shall take place after this Act has come into operation, be liable for the debts of his wife contracted before marriage (*h*), but the wife shall be liable to be sued for, and any property belonging to her for her separate use (*i*) shall be liable to satisfy such debts, as if she had continued unmarried. Husband not to be liable on his wife's contracts before marriage.

(*h*) A husband, married after the passing of the Act, is now released at law from all liability on the ground of coverture to pay his wife's debts contracted when *sole*. But in equity, where marriage has been made a means of defrauding creditors, as where a woman, having contracted debts, marries without reserving to herself separate property, and her property thereupon becomes vested in her husband in his marital right, it is conceived that the creditors of the wife may have a remedy against the husband, to the extent of any property which has come to him in right of his wife. Thus in *Colombine v. Penhall* (1 Sm. & Gif. 228), *Stuart*, V.C., lays down the principle that "where there is evidence of an intent to defeat and delay creditors, and to make the celebration of marriage part of a scheme to protect property against the rights of creditors, the consideration of marriage cannot support such a settlement" (page 256). And see *Bulmer v. Hunter*, L. R. 8 Eq. 46; 38 L. J. (Ch.) 543. Husband not liable for wife's antenuptial debts. Whether when marriage a fraud on creditors—query.

(*i*) The creditor's remedy extends, not only to separate property of the wife made such by the Act, but to her equitable separate property generally. Thus in *Sanger v. Sanger* (L. R. 11 Eq. 470; 19 W. R. 792) a stop order was granted on a fund in Court, in aid of a charging order made in an action, in which judgment had been entered up against a married woman, though the fund was subject to restraint against anticipation. Even under the old practice, where husband and wife were sued jointly for debts of the wife contracted before marriage, and judgment was obtained against them, the Court refused to discharge the Separate prop- erty liable, though a re- straint against anticipation.

Power to  
commit to  
prison, when  
exercisable.

wife from custody under a *ca. sa.* where it appeared that she had separate property. See *Ivens v. Butler*, 26 L. J. (Q.B.) 145; *Jay v. Amphlett*, 32 L. J. (Ex.) 176. And as to committing a married woman to prison, though it appeared that she had no separate property, see *Beynon v. Jones*, 15 M. & W. 566. But now by 32 & 33 Vict. c. 62, s. 5 (2) (The Debtor's Act, 1869) it is enacted, that the jurisdiction to commit to prison "shall only be exercised where it is proved to the satisfaction of the Court, that the person making default, either has or has had since the date of the order or judgment, the means to pay the sum, in respect of which he has made default, and has refused or neglected, or refuses or neglects to pay the same." In *Bustard v. Todd* (not yet reported\*), where judgment had been recovered against a married woman under this section, a rule *nisi* was granted for her examination, with a view to her commitment under the Debtor's Act. And see note (k) to sect. 13 and note (m) to sect. 14.

Married woman  
to be liable to  
the parish for  
the maintenance  
of her husband.

XIII. Where in England the husband of any woman having separate property (k) becomes chargeable to any union or parish, the justices having jurisdiction in such union or parish may, in petty sessions assembled, upon application of the guardians of the poor, issue a summons against the wife, and make and enforce such order against her for the maintenance of her husband as by the thirty-third section of "The Poor Law Amendment Act, 1868," they may now make and enforce against a husband for the maintenance of his wife who becomes chargeable to any union or parish (l). Where in Ireland relief is given under the provisions of the Acts relating to the relief of the destitute poor to the husband of any woman having separate property, the cost price of such relief is hereby declared to be a loan from the guardians of the union in which the same shall be given, and shall be recoverable from such woman as if she were a *feme sole* by such and the same actions and proceedings as money lent.

Maintenance,  
how enforced.

(k) The liability of a married woman is not in terms restricted to her statutory separate property. See note (i) to sect. 12.

(l) Under 31 & 32 Vict. c. 122, s. 33 (the Poor Law Amendment Act, 1865), when a married woman requires relief without her husband, the guardians or overseers, as the case may be, may apply to the justices in petty sessions for a summons against the husband, requiring him to show cause why an order should not be made upon

\* See Law Journal of Nov. 9, 1872.

him to maintain his wife; and thereupon the justices may make an order for the payment of such weekly or other sum by the husband, as may seem right. And under 11 & 12 Vict. c. 43, s. 19, where an order requires payment of a sum of money, justices of the peace are empowered to issue a warrant of distress to levy the same, and in default may commit the person to prison on whom such order is made.

As to the probable effect of this section in raising the presumption of advancement to a husband where the wife has made investments in his name, see note (m) to sect. 14. Advancement to husband.

XIV. A married woman having separate property (m) shall be subject to all such liability for the maintenance of her children as a widow (n) is now by law subject to for the maintenance of her children: Provided always, that nothing in this Act shall relieve her husband from any liability at present imposed upon him by law to maintain her children. Married woman to be liable to the parish for the maintenance of her children.

(m) The change in the law effected by this section, in making the wife liable to maintain her children out of her separate estate, where the husband's means are inadequate, will, it is submitted, produce a corresponding change in the practice of the Court of Chancery, in its protective jurisdiction over infant wards of Court. Hitherto, the wife being under no legal obligation to support her children during her husband's life, the Court has refused to order contribution towards their support from her separate estate, even in a case where the children were in the greatest destitution, and their mother had eloped from her husband (*Hodgens v. Hodgens*, 4 Cl. and Fin. 323, 373). And see notes to *Eyre v. Countess of Shaftesbury*, 2 Wh. and Tu. L. C. 651, 3rd Ed. Maintenance of separate property in Chancery.

For the like reason, where a married woman has out of her separate property made a purchase in the name of a child, the presumption of advancement will now apparently arise. See and distinguish *Re De Visme*, 2 De G. Jo. & S. 17. Presumption of advancement.

The effect of this and the preceding section being to render the wife liable in certain events to maintain her husband and children, it will be inadvisable to make investments of her separate property in their names, whether jointly with her own or not, since if the wife die leaving any such nominees surviving, the property will, if the above view of the law be correct, pass to them as an advancement, and will not be subject to her disposition by will. Investment in names of husband or children.

As to the jurisdiction of County Courts over infants, see note (e) to sect. 10; and as to the signification of separate property, see note (i) to sect. 12.

(n) By 4 & 5 Will. 4, c. 76, s. 56, it is enacted, that "any relief given to or on account of any child or children under the age of sixteen of any widow, shall be considered as given to such widow; provided always that nothing herein contained, shall discharge the Poor Law relief of children.

father and grandfather, mother and grandmother, of any poor child, from their liability to relieve and maintain such poor child, in pursuance of the provisions of a certain Act of Parliament passed in the forty-third year of the reign of Her late Majesty Queen Elizabeth, intituled "An Act for the Relief of the Poor." And see 4 Burn's J. P. 294 *et seq.*, Ed. 1869.

Commencement  
of Act.

XV. This Act shall come into operation at the time of the passing of this Act (o).

(o) This Act was passed on the 9th day of August, 1870.

Act not to  
extend to Scot-  
land.  
Short title.

XVI. This Act shall not extend to Scotland.

XVII. This Act may be cited as the "Married Women's Property Act, 1870."

## APPENDIX.

*An Act to amend the Law relating to Divorce and Matrimonial Causes in England.* 20 & 21 VICT. c. 85.

§ 21. A wife deserted by her husband may at any time after such desertion, if resident within the metropolitan district, apply to a police magistrate, or if resident in the country, to justices in petty sessions, or in either case to the Court, for an order to protect any money or property she may acquire by her own lawful industry, and property which she may become possessed of after such desertion against her husband or his creditors, or any person claiming under him; and such magistrate or justices, or court, if satisfied of the fact of such desertion, and that the same was without reasonable cause, and that the wife is maintaining herself by her own industry or property, may make and give to the wife an order protecting her earnings and property acquired since the commencement of such desertion from her husband and all creditors and persons claiming under him, and such earnings and property shall belong to the wife as if she were a *feme sole*: Provided always, that every such order, if made by a police magistrate or justices at petty sessions, shall, within ten days after the making thereof, be entered with the Registrar of the County Court within whose jurisdiction the wife is resident; and that it shall be lawful for the husband and any creditor or other person claiming under him to apply to the Court, or to the magistrate or justices by whom such order was made, for the discharge thereof, provided also, that if the husband or any creditor or person claiming under the husband shall seize or continue to hold any property of the wife after notice of any such order, he shall be liable at the suit of the wife (which she is hereby empowered to bring) to restore the specific property, and also for a sum equal to double the value of the property so seized or held after such notice as aforesaid. If any such order of protection be made, the wife shall, during the continuance thereof, be and be deemed to have been, during such desertion of her, in the like position in all respects with regard to property and contracts, and suing and being sued, as she would be under this Act if she obtained a decree of judicial separation.

§ 25. In every case of a judicial separation, the wife shall, from the date of the sentence and whilst the separation shall continue, be considered as a *feme sole* with respect to property of every description which she may acquire or which may come to or devolve upon her; and such property may be disposed of by her in all

Wife deserted by her husband may apply to a police magistrate or justices in petty sessions for protection.

In case of a judicial separation, the wife to be considered a *feme sole* with

respect to property she may acquire, &c.

respects as a *feme sole*, and on her decease the same shall, in case she shall die intestate, go as the same would have gone if her husband had been then dead: Provided that if any such wife should again cohabit with her husband, all such property as she may be entitled to when such cohabitation shall take place shall be held to her separate use, subject, however, to any agreement in writing made between herself and her husband while separate.

Also for purposes of contract and suing.

§ 26. In every case of a judicial separation, the wife shall, whilst so separated, be considered as a *feme sole* for the purposes of contract, and wrongs and injuries, and suing and being sued in any civil proceeding; and her husband shall not be liable in respect of any engagement or contract she may have entered into or for any wrongful act or omission by her, or for any costs she may incur as plaintiff or defendant: Provided, that where, upon any such judicial separation, alimony has been decreed or ordered to be paid to the wife, and the same shall not be duly paid by the husband, he shall be liable for necessities supplied for her use: Provided also, that nothing shall prevent the wife from joining, at any time during such separation, in the exercise of any joint power given to herself and her husband.

21 & 22 VICT. *An Act to amend the Twentieth and Twenty-first Victoria, Chapter C. 108. Eighty-five.*

Provisions respecting property of wife to extend to property vested in her as executrix, &c.

§ 7. The provisions contained in this Act, and in the said Act of the twentieth and twenty-first Victoria, chapter eighty-five, respecting the property of a wife who has obtained a decree for judicial separation or an order for protection, shall be deemed to extend to property to which such wife has become or shall become entitled as executrix, administratrix, or trustee since the sentence of separation or the commencement of the desertion (as the case may be); and the death of the testator or intestate shall be deemed to be the time when such wife became entitled as executrix or administratrix.

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